RECORD AND BRIEFS

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IN THE
Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* DEBORA NEARMAN IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This brief addresses the question presented by petitioners:

1. Should *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), be overruled and public sector agency fee arrangements declared unconstitutional under the First Amendment?

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STATEMENT OF INTEREST[1]

Debora Nearman respectfully submits this brief as *amicus curiae* in support of petitioner. *Amicus* Debora Nearman (*"Amicus"*) urges the Court to overrule *Abood* because, among other reasons, it forces her to associate with and pay dues to an organization that actively campaigns against her husband.

Amicus is a public employee who works as a Systems Analyst for the Oregon Department of Fish and Wildlife. *Amicus* is a nonmember of her union, Service Employees International Union Local 503, Oregon Public Employees Union ("SEIU"), but is still required to make "payments-in-lieu-of-dues" to SEIU, which are equal to full member dues.

Amicus is not a member of her union because she opposes positions advanced by SEIU in collective bargaining and opposes SEIU's political speech outside of collective bargaining. Specifically, in the 2016 general election, *Amicus* strongly supported her husband, Mike Nearman, for State Representative in the Oregon Legislature; however, her union spent

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[1] Counsel for *Amicus* certifies that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution to the brief. Monetary contributions to the preparation of this brief were made by Seneca Sustainable Energy, LLC; Freres Lumber Company; and Starfire Lumber Company. All parties have received notice of *Amicus's* intention to file this brief at least 10 days prior to the due date. All parties have filed blanket *amicus* consent letters.

$53,260 to oppose his candidacy. Additionally, *Amicus* is a devout Catholic and strongly opposes SEIU's position on abortion and its financial support of pro-choice political candidates and legislation. *Amicus* objects to being required to financially support and associate with an organization that opposes her husband's candidacy, opposes her political views, and opposes her religious views.

In 2016, *Amicus* was required to pay annual dues of $1,258.91 to SEIU. *Amicus* has taken affirmative steps to opt out and in 2016 she received a refund of $273.68 for nonchargeable expenses.

SUMMARY OF ARGUMENT

It is a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. __, 134 S. Ct. 2618, 2644 (2014). An exception to this principle was created in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), that permits the compelled subsidization of political speech uttered in collective bargaining. *Abood* recognized that unions engage in political speech during collective bargaining because "public employee unions attempt to influence governmental policymaking." *Id.* at 231. However, *Abood* distinguished speech in the context of collective bargaining from speech regarding "other ideological causes not germane to its duties as collective-bargaining representative" and allowed compelled funding of the former. *Id.* at 235. Thus, unions may

require nonmembers to subsidize collective bargaining speech (chargeable expenses) but not non-collective bargaining speech (nonchargeable expenses).

The distinction *Abood* drew fails to adequately protect First Amendment Rights for the numerous reasons the Court stated in *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298 (2012) and *Harris*. *Amicus's* brief will examine and illustrate two of those reasons: (1) "free-rider arguments . . . are generally insufficient to overcome First Amendment objections," *Knox*, 567 U.S. at 311, and (2) "*Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends." *Harris*, 573 U.S. __, 134 S. Ct. at 2632.

The "free-rider" argument persuaded the *Abood* Court to create an exception that results in *Amicus* being required to support an organization that vehemently opposes her husband and, in effect, that opposes *Amicus* herself. This flagrant violation of First Amendment rights should be much more concerning to this Court than the existence of "free-riders."

The line *Abood* attempted to draw between collective bargaining political speech and non-collective bargaining political speech is a legal fiction and results in compelled subsidization of ideological causes not germane to collective bargaining. Although the line between the two types of speech has

always been somewhat hazy, today Oregon unions explicitly take positions on legislative proposals within the parameters of collective bargaining because unions view the bargaining table as a more favorable forum in which to achieve their legislative goals. As such, there is no meaningful way to separate chargeable and nonchargeable expenses.

ARGUMENT

I. Oregon Authorizes "Agency-Fees."

Similar to the Illinois laws under review, Oregon law allows public employers and unions to require public employees, as a condition of employment, to either join the union representing employees or pay the equivalent of dues to that union.

Oregon's Public Employee Collective Bargaining Act ("PECBA") allows a certified union to become the exclusive bargaining representative for "all employees in an appropriate bargaining unit." OR. REV. STAT. 243.650(8). Public employers covered by the PECBA include, among others, the State of Oregon, cities, counties, school districts, community colleges, public hospitals, mass transit districts, and special districts. OR. REV. STAT. 243.650(20). A public employee is an employee of a public employer but does not include elected officials, confidential employees, supervisory employees, or managerial employees. OR. REV. STAT. 243.650(10). For purposes of collective bargaining only, family child care providers and home care workers paid by a public agency are public

employees. Or. Const., Art. XV, § 11(2)(f); OR. REV. STAT. 657A.430(2).

Public employers and unions that are exclusive bargaining representatives are authorized to enter into "fair-share agreements," pursuant to which "employees who are not members of the employee organization are required to make an in-lieu-of-dues payment to an employee organization. . . ." OR. REV. STAT. 243.650(10). A required payment-in-lieu-of-dues, also known as an "agency fee," is "an assessment to defray the cost for services by the exclusive representative in negotiations and contract administration of all persons in an appropriate bargaining unit who are not members of the organization serving as exclusive representative of the employees." OR. REV. STAT. 243.650(18). These compulsory agency fees imposed upon nonmembers "must be equivalent to regular union dues and assessments, if any, or must be an amount agreed upon by the public employer and the exclusive representative of the employees." *Id.* Typically, agency fees are 100% of full union dues.

Because the First Amendment prohibits compelling nonmembers to support union activities that are not germane to its duties as collective bargaining representative, unions must allow nonmembers the opportunity to recover the portion of their agency fee that pays for these "nonchargeable" expenses. *Abood*, 431 U.S. at 235-36. Annually unions must send nonmembers a "*Hudson* notice" that sets forth the percentage of the agency fee spent on chargeable and nonchargeable expenses. *Teachers*

v. Hudson, 475 U.S. 292, 304-07 (1986). In Oregon, to recover the portion of the agency fee spent on nonchargeable expenses, nonmembers must take steps to "opt out" and request a rebate of those funds.

Nonmembers may not opt out of paying chargeable expenses, which ostensibly covers the cost of union bargaining and representation. "Collective bargaining" is defined as the mutual obligation of the public employer and the union to meet and confer regarding employment relations for the purpose of negotiating a written contract." OR. REV. STAT. 243.650(4). Oregon law requires public employers to negotiate all matters of "employment relations," which "includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment." OR. REV. STAT. 243.650(7)(a).

As unions have explained, "The reality of bargaining is that most matters relate in some way – directly or in a more attenuated fashion – to these mandatory categories even if they also involve some management prerogative." *Public Employees and Oregon's Scope of Bargaining, A Labor Perspective,* LABOR EDUCATION AND RESEARCH CENTER MONOGRAPH, UNIVERSITY OF OREGON, p. 45 (18th ed. 2007). In addition to the broad scope of matters that must be negotiated, public employers and unions may agree to collectively bargain regarding any subject that would not require commission of an unconstitutional or illegal act. *Springfield Educ. Ass'n v. Springfield Sch. Dist.*, 1 PECBR 347 (1975),

aff'd in part 24 Or. App. 751, 547 P.2d 647 (1976), *recon.* 25 Or. App. 407, 549 P.2d 1141 (1976), *aff'd*, 290 Or. 217, 621 P.2d 547 (1980).

II. The Court Should Overrule *Abood* Because It Fails to Protect Nonmembers' First Amendment Rights.

A. Because *Abood* Places "Free-Rider" Objections Above First Amendment Rights, *Amicus* Is Required to Associate With and Financially Support an Organization that Campaigns Against Her Husband.

Amicus's husband, who was the incumbent state representative for his House district, ran to retain his seat in the 2016 general election. *Amicus* strongly supported her husband's candidacy and campaigned in support of him. At the same time *Amicus* was engaging in political speech in favor of her husband, her union - SEIU - was engaging in political speech that directly contradicted *Amicus's* speech. Jeff Pullman, an SEIU Organizer, formed and directed a political action committee named "The Real Mike Nearman Committee," which received $53,260 - 49.17% of total funding - from SEIU's PAC, Citizen Action for Political Education.[2]

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[2] The Real Mike Nearman Committee was completely funded by public employee unions. In addition to SEIU, the Committee was funded by Oregon AFSCME Council 75, American Federation of Teachers- Oregon Candidate PAC, and Oregon Education Association- People for Improvement of Education.

The Real Mike Nearman Committee aggressively campaigned against *Amicus's* husband and distributed fliers that disparaged him. In the two months before election day, *Amicus* received eleven mailers from The Real Mike Nearman Committee that accused her husband of being unethical, being a "LAWBREAKER!", and opposing paying disabled persons a fair wage. *Amicus* was very distressed and humiliated by her union's political campaign against her husband, especially by the charge that he did not support paying disabled persons a fair wage because *Amicus* is herself disabled. *Amicus* did not see all the negative campaign material paid for by SEIU because her husband often would collect the mail first and hide the upsetting mailers from her. *Amicus* was approached multiple times in public and received phone calls at home by persons who had received the mailers.

The First Amendment protects *Amicus* from having to associate with and financially support an organization that actively campaigns against her husband and, in effect, against *Amicus*. However, under current law, *Amicus's* constitutional rights are supposedly being met because *Abood* places "free-

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See ORESTAR (Oregon Elections System for Tracking and Reporting), a state database that reports all state political contributions and expenditures. https://secure.sos.state.or.us/orestar/cneSearch.do?cneSearchButtonName=search&cneSearchFilerCommitteeId=18317

rider" objections above First Amendment rights. In 2012, *Knox* recognized this anomaly and questioned the validity of *Abood*'s holding that public employees can constitutionally be forced to subsidize union speech to influence government policymakers. *Amicus's* situation illustrates the constitutional injuries that can occur when the Court allows the freedoms of association and speech to be trumped by the "free-rider" argument, which at its core is simply an effort to quash debate between employees in an effort to promote labor peace. This rationale is inconsistent with other precedents that protect even unpopular and offensive speech, *see, e.g., Texas v. Johnson*, 491 U.S. 397 (1989); thus, *Abood*'s rationale should be rejected.

B. Under *Abood*, Public Employees Are Required to Support Organizations that Are Extremely Politically Active and Do Not Reflect Their Views.

Oregon public employee unions are extremely politically active. In 2016, proponents of controversial corporate gross receipts tax (Measure 97) raised a total of $16,260,822.95 in campaign contributions, 97.6% of which came from public employee unions. [3] Specifically, SEIU contributed $5,353,545. *Amicus* opposed Measure 97, yet her agency fee was used to

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[3] *See* ORESTAR, https://secure.sos.state.or.us/orestar/CommitteeSearchThirdPage.do

support the tax because SEIU Local 503 did not contribute through its PAC. Rather, SEIU used "fair share" dues paid by nonmembers to support the tax.[4]

In addition to fiscal issues, *Amicus* and SEIU disagree on religious and social issues. *Amicus* is a devout Catholic and strongly supports pro-life candidates; however, in 2016 SEIU contributed $2,122,118.51 to pro-choice candidates and issues. To compound this constitutional injury, on July 5, 2017, the pro-choice candidates that SEIU helped elect to the Oregon Legislature passed House Bill 3391, a mandate for universal abortion coverage for all woman in Oregon, costing taxpayers $10 million. H.B. 3391, 2017 Leg., 79th Sess. (Or. 2017), https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/HB3391/B-Engrossed. Additionally, SEIU directly lobbied in support of House Bill 3391. *See* https://olis.leg.state.or.us/liz/2017R1/Downloads/FloorLetter/2160. Conversely, organizations that *Amicus* supports and volunteers for – the Catholic Church and Oregon Right to Life – were in opposition to the bill. *See* https://olis.leg.state.or.us/liz/2017R1/Downloads/CommitteeMeetingDocument/136756.

Oregon's teacher unions are also extremely politically active. In fact, in 2008 teacher unions

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[4] *See* ORESTAR, *e.g.*, https://secure.sos.state.or.us/orestar/cneSearch.do?cneSearchButtonName=search&cneSearchFilerCommitteeId=18134

contributed $357 per teacher to influence campaign elections, more than unions in any other state spent and well above the national average of $22 per teacher. Betsy Hammond, *Oregon Is The Top State For Teachers Union Political Influence In 2008*, THE OREGONIAN, July 14, 2010.

Moreover, data shows that teacher unions' campaign contributions do not reflect the political preferences of approximately half of Oregon teachers. Approximately 55% of Oregon teachers are registered Democrats, 25% are registered Republicans, and 20% are unaffiliated or belong to minor political parties.[5] Since 2006, Oregon teacher unions have contributed over $5 million to political candidates and approximately 98% of that amount has gone to Democratic candidates, approximately 2% has gone to Republican candidates, and .12% has gone to Independent/Other candidates.[6] This means teacher unions give almost all their political campaign contributions to Democratic candidates in spite of the fact roughly half of the teachers they represent are not Democrats. *Amicus* recognizes that the law

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[5] Data is based on current teacher licenses and the Oregon Voter File. All teachers must be licensed by the Oregon Teacher Standards and Practices Commission. OR. REV. STAT. 342.121. Counsel for *Amici* received the names of all teachers with a current license pursuant to a public records request on August 18, 2015. Teachers' names were then matched to the Oregon Voter File, which contains the party affiliation of voters.

[6] Data is based on ORESTAR, https://secure.sos.state.or.us/orestar.

allows teacher unions to make these contributions (*see, e.g., Citizens United,* 558 U.S. 310 (2010)); however, these contributions are at odds with the political preferences of almost half of Oregon teachers and this "creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Knox,* 567 U.S. at 312. This overwhelming support of Democratic candidates also results in some nonmembers being forced to pay dues to organizations that supports candidates that the nonmember opposes, as it is doubtful that all Republican and Independent nonmembers support Democratic candidates.

Additionally, all nonmembers of the Oregon Education Association "OEA" were recently forced to associate with and pay dues to an organization that supported legalizing recreational marijuana use, regardless of nonmembers' personal views on drug use. During the 2014 general election, the OEA contributed $700,000[7] to Defend Oregon PAC,[8] then Defend Oregon contributed $300,000[9] to the Yes on 91 PAC. Ballot Measure 91 subsequently passed and

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[7] ORESTAR database, https://secure.sos.state.or.us/orestar. Transaction # 1871200 ($275,000) on Oct. 10, 2014; # 1871199 ($175,000) on Oct. 10, 2014; # 1890048 ($200,000) on Oct. 20, 2014; and # 1899539 ($50,000) on Oct. 24, 2014.

[8] ORESTAR PAC Id. # 13130.

[9] ORESTAR database, https://secure.sos.state.or.us/orestar. Transaction # 1867210 ($100,000) on Oct. 12, 2014, and # 1888243 ($200,000) on Oct. 22, 2014.

legalized the recreational use of marijuana in Oregon. There is no rational public policy reason for a teacher union, or teacher, to support the recreational use of a federally banned substance; yet, nonmembers were forced to be complicit.

C. *Abood* is Unworkable Because Public Employee Unions Conflate Collective Bargaining and Lobbying.

Abood held the Constitution requires that union expenditures for "ideological causes not germane to its duties as a collective-bargaining representative" "be financed from charges, dues, or assessments paid by employees who do not object to advancing such causes and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 235-36. This holding begs the question: What is germane to a union's duties as a collective bargaining representative? *Abood* declined to answer this important question, but recognized that "[t]here will, of course, be difficult problems in drawing lines between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." *Id.* at 236. The Court in *Harris* observed that *Abood* failed to appreciate the magnitude of this difficulty. *Harris*, 573 U.S. __, 134 S. Ct. at 2632-34.

In Oregon, distinguishing between collective bargaining and other union activities is more than difficult; it is nearly impossible because unions can

rationalize a connection between representing employees and most political issues. For example, in 2014, SEIU and other public employee unions supported a ballot measure to issue driver licenses to undocumented immigrants because it would allow "all eligible Oregonians to safely and legally drive to work." Oregon Secretary of State, *Voters' Pamphlet*, Measure 88, Arguments in Favor, p. 64 (2014).[10] SEIU and other public employee unions opposed a ballot measure that would have allowed nonpartisan primary elections, claiming "[w]orking people often participate less in primary elections because they are busy." *Id.*, Measure 90, p. 102.

In 2015, AFSCME Council 75 supported a legislative proposal to regulate toxins in toys because the union represented "workers [who] believe this bill is a good step in keeping toxins out of our environment . . . ." S.B. 478, 2015 Leg., 78th Sess., Floor Letters, AFSCME (Or. 2015). Public employee unions have also entered the climate change debate and support legislative proposals to mandate low carbon fuels because "Oregon must address the pollution that will destabilize our climate and undercut our natural resource based economy, while safeguarding prosperity and opportunity for all working families." *Id.*, SB 324, AFSCME. In each example, the activity or speech was on behalf of the union, not the union's PACs.

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[10] http://sos.oregon.gov/elections/Documents/pamphlet/2014/general-book12.pdf.

Given these justifications for taking positions on legislative issues that have no reasonable nexus to wages, benefits, or working conditions, it is difficult to imagine a political issue that a public employee union would consider not germane to its duties as exclusive representative. *Abood* allows unions to charge nonmembers for these non-collective bargaining policy choices, in violation of the First Amendment.

In addition to creatively connecting political issues to representing workers, Oregon's public employee unions also explicitly lobby during collective bargaining. *Abood's* focus on the forum of the speech, rather than the nature of the speech itself, allows unions to impermissibly redefine and expand the forum to include legislative activity, which is clearly outside the scope of what *Abood* considered to be chargeable collective bargaining activity. *See Abood* 431 U.S. at 222 (examples of collective bargaining include negotiating a medical benefits plan, negotiating the right to strike, negotiating a wage policy, seeking a clause in a collective bargaining agreement proscribing racial discrimination). In Oregon, unions used to comport with the chargeable/nonchargeable paradigm by separating collective bargaining and legislative activities. However, starting in 1993, unions became more inventive in achieving their political goals and, admittedly, began bringing legislative matters into collective bargaining negotiations because unions viewed the bargaining table as a more favorable forum. This caused collective bargaining and political

legislative activities to become inextricably intertwined.

For example, in 1993 the Oregon Legislature proposed several bills that would have privatized certain public agencies. Tim Nesbitt and Greg Schneider, *State Bargaining Adjusts To The Growing Shadow Of Measure 5*, LABOR EDUCATION AND RESEARCH CENTER MONOGRAPH, UNIVERSITY OF OREGON, p. 134-35 (13th ed. 1994). In order to obtain a pay raise for certain employees in collective bargaining, SEIU, then known as the Oregon Public Employees Union, agreed to support the privatization legislative proposals outside of negotiations. *Id.* Similarly, unions concede that legislative proposals to consolidate and reconfigure state agencies that aim to reduce state spending had, and will continue to have, a direct impact on the demands unions make at the bargaining table. *Id.* at 134. This union concession reflects a political reality: unions do not separate their legislative activities from their collective bargaining activities. According to public employee unions,

> [I]f problems related to reorganization, privatization, or the composition of the workforce are kept from the bargaining table, the potential for misunderstanding and conflict increases. At the table, mutual solutions are readily available . . . . the best path to effective labor relations is through more bargaining over more issues, not through handcuffing the

> process or excluding issues from the bargaining table.

Id. at 137.

All unions have continued the trend of mixing bargaining and lobbying. As explained by Tim Nesbitt, past president of the Oregon AFL-CIO, "Changing circumstances are forcing unions to look beyond 20th century labor laws to deal with the challenges of a 21st century economy. That means more legislating than bargaining and more emphasis on political campaigning than workplace organizing." Tim Nesbitt, *Labor Unions and Oregon's New New Deal*, THE OREGONIAN, Aug. 27, 2015. Unions view this expanded role for exclusive representatives to be necessary because,

> [t]o try to make jobs better for any significant number of low-wage Oregon workers through workplace elections and collective bargaining would be a fool's errand for Oregon's unions, whose traditional organizing efforts have been netting them at most a few thousand new members a year. But the sick leave and retirement benefits mandated by the Legislature this year will reach hundreds of thousands of Oregon workers, as would a further increase in the minimum wage.

Id. This approach is not unique to Oregon, as noted by Tim Paulson, executive director of the San

Francisco AFL-CIO: "We are going to expand the idea of collective bargaining. You can have collective bargaining through legislation. You can have collective bargaining through ballot measures." Harold Meyerson, *At AFL-CIO Convention, Labor Embraces The New America,* WASHINGTON POST, Sept. 10, 2013.

Abood recognized that the "process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities." 431 U.S. at 236. However, the Court did not extend the process of collective bargaining to include explicit lobbying on matters such as climate change and recreational use of marijuana. Such an extension is unconstitutional and unworkable for several reasons. First, Oregon law requires labor negotiations to be "conducted in open meetings unless negotiators for both sides request that negotiations be conducted in executive session." OR. REV. STAT. 192.660(3). Unions violate this requirement when bargaining occurs through lobbying. Second, traditional collective bargaining allows employees to see the agreements negotiated between unions and employers because such agreements are reduced to writing. This provides a level of transparency and accountability even if employees ultimately take issue with the agreements. There is no requirement that legislative agreements orchestrated between unions and the government be reduced to writing and this can leave employees in the dark about the unions' legislative deals.

Because *Abood* allows unions to conflate chargeable collective bargaining expenses and nonchargeable lobbying expenses with no meaningful method of separation, nonmembers are forced to subsidize union speech about public policy choices with which the nonmember may disagree. For instance, *Amicus* opposed Measure 88 (2014) yet she was required to pay dues that SEIU spent to support the ballot measure, because SEIU considered it a chargeable expense. This cannot withstand constitutional scrutiny. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, __, 131 S. Ct. 1207, 1215 (2011) ("'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' Accordingly, 'speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'") (citations omitted); *Citizens United v. F.E.C.*, 558 U.S. 310, 340 (2010) ("Laws that burden political speech are 'subject to strict scrutiny' ....") (citation omitted).

CONCLUSION

Amicus curiae Debora Nearman urges the Court to overrule *Abood*.

Respectfully submitted,

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